Group Briefing
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The beginning of the end for extensive discovery requests?

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"There is something seriously amiss with the discovery system as it currently operates," Judge Hogan.

Delivering the judgment of the Court of Appeal in Tobin v The Minister for Defence (9 July 2018), Judge Hogan stated that, in cases where the documentation sought is likely to be extensive, judges should refuse to grant an order for discovery unless all other avenues (such as interrogatories and notices to admit facts) have been exhausted and these have been shown to be inadequate.

The judgment also made it clear that, when dealing with discovery requests, the High Court should not treat State defendants, and it would seem by extension any other well-resourced defendant, differently to other defendants. The fact that a particular defendant has the resources to deal with the request should not in any sense impact on the nature of the demands imposed on it.

WHAT IS AMISS?

The concerns expressed by Judge Hogan will come as no surprise to anyone who has experience of extensive discovery in litigation before the Irish High Court, and indeed Judge Hogan is not the first judge to have been openly critical of the current discovery process. But his observations were particularly pointed.

He described the current situation as a "crisis", referring to the burden placed on litigants and the significant costs incurred by extensive discovery orders, and the consequent delay which impacts not only the parties themselves but also the wider legal system. A process, he said, which was designed to assist the fair administration of justice now threatens to overwhelm it by imposing disproportionately onerous demands on litigants.

The problem, as identified by Judge Hogan, is that existing discovery practice has its origins in the seminal 1882 case, '*Peruvian Guano*', and has failed to take account of the massive technological advancements since then. The Peruvian Guano case established the 'relevance and necessity' test - a party is entitled to any document which relates to the matters in question in the proceedings and which contains information which may (not 'must') either directly or indirectly enable that party to advance his/her own case or to damage the other side's case. This test worked well for many generations because the number of documents it captured was relatively small and manageable. But the explosion of data has changed this dramatically.

HOW DOES THIS MANIFEST ITSELF?

The case before the Court of Appeal was, Judge Hogan said, a paradigm example of how present day discovery practice has gone seriously amiss. It is a "routine" personal injuries case. The plaintiff is seeking damages from the State for personal injuries he claims to have suffered while employed as an aircraft mechanic with the Aer Corps from 1989 to 1999. In the High Court he obtained an order for discovery of thirteen categories of documents dating back to 1990.

The uncontested evidence before the High Court was that it would take 10 members of staff in the Department of Defence – all of whom would have to be diverted from their existing duties – some 220 man hours to review, locate and categorise the documents sought. Many of these records are in hard copy form only and are stored in a variety of locations. Judge Hogan noted that it was simply inevitable that the burden involved in seeking out and cataloguing hard copy documents dating back some 28 years was likely to be very considerable.

WHAT IS THE ALTERNATIVE?

Judge Hogan has made it clear that in cases where the discovery sought is likely to be extensive, the High Court should not make an order for discovery unless all other avenues have first been exhausted and these have been shown to be insufficient. The judge specifically encouraged more widespread use of interrogatories (questions designed to elicit facts) and notices to admit documents.

WILL WE SEE MORE REFORM?

This may have an impact on the breadth of discovery requests made before the Irish High Court, but what is really needed is more widespread reform. In March 2017, a group chaired by the President of the High Court, Mr Justice Peter Kelly was established to review the administration of civil justice in Ireland and to make recommendations to the Minister for Justice as to how Irish court procedure and rules might be reformed to improve access to justice. One of the areas under review is discovery. The Commercial Litigation Association of Ireland, of which Richard Willis is an active member, has made recommendations to the Review Group on how the Irish court rules might be changed to reduce costs in discovery exercises. Change is coming. Watch this space.